IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELALTE SIDE

APPEAL FROM ORDER NO.864 OF 2005
WITH
CIVIL APPLICATION NO.1022 OF 2005

Mr.Gration Robert Lewis. ...Appellant.
Vs.
Mr.Moully Lobo & Ors. ...Respondents.
....
Mr. Rajiv Patil for the Appellant.
Mr.Ameya Tamhane for Respondent No.2.
Mr.A. H. Palekar for Respondent No.3.
.....

CORAM : DR. D.Y. CHANDRACHUD, J.

December 13, 2005.

P.C.:

This Appeal from Order is filed by the Third Defendant against an interim order in a suit for specific performance. The First Respondent is the Plaintiff. The subject matter of the suit, in so far as the Appellant is concerned, is Survey No.33, Hissa 7 and 8B. For convenience of reference, it would be appropriate to refer to the parties by their description in the suit.

2. There was an agreement to sell between the Plaintiff and

the First and Second Defendants, dated 5th March 2001. Subsequent thereto, the First and Second Defendants entered into a registered sale deed with the Appellant on 21st September 2001. The suit for specific performance was instituted on 2nd May 2003 in respect of three pieces of immovable property of which Sr. No.2 in the description of properties is the subject matter of the agreement with the Appellant. The Learned Trial Judge granted an interim order on 2nd May 2003 which was confirmed by the impugned order dated 16th July 2005.

3. On behalf of the Appellant it has been submitted that the Learned Trial Judge ought to have considered the question of possession for the purposes of considering the application for interim relief. The case of the Appellant is that in pursuance of the registered conveyance dated 21st September 2001, the Appellant has been placed in possession and a copy of the possession receipt is annexed at Exh.E to the Paper-Book. Hence it has been submitted that the Learned Trial Judge should have considered the defence of the Appellant that it is the Appellant who is in possession and that therefore, that possession cannot be disturbed at an interlocutory stage. On the other hand, on behalf of the First

Respondent, who is the original Plaintiff, the claim of the Appellant to be in possession is disputed. According to the Plaintiff, it was the First Defendant who was placed in possession in pursuance of the agreement dated 5th March 2001, which was prior in point of time to the sale deed executed in favour of the Appellant.

4. The material which is available on the record is not sufficient for this Court to enter any finding even prima facie on the question as to which of the rival parties is in possession. On the one hand, as noted above, it is the case of the original Plaintiff that she was placed in possession pursuant to the agreement to sell with her which is prior in time. On the other hand, it has been submitted on behalf of the Appellant that possession was given to the Appellant in pursuance of a registered conveyance. The case of the Appellant will have to be evaluated by the Trial Court because if the Plaintiff had actually been placed in possession in pursuance of the agreement to sell, there was no occasion to place the Third Defendant in possession under a subsequent agreement. The Trial Court has not dealt with the issue of possession. A remand is necessary in order that the Trial Court should consider this aspect as well. Hence, in order to facilitate a fresh

determination of the application for the grant of interim relief, it would be appropriate to quash and set aside the impugned order without any further consideration of the merits of the rival contentions. Accordingly, the impugned order dated 16th July 2005 is quashed and set aside. The Civil Judge, Senior Division, Panvel shall pass fresh orders on the application at Exh.5 in Special Civil Suit No.33 of 2005 within a period of eight weeks from the production of a certified copy of this order before the Court. In the meantime, the ad-interim injunction dated 2nd May 2003 which held the field during the pendency of the application at Exh.5 shall continue to remain in operation. The appeal is accordingly disposed of.

5. In view of the disposal of the appeal, the Civil Application does not survive and is accordingly disposed of.

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